IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KIM HEE JU BOOTH, Appellant.	No. 42246-8-II UNPUBLISHED OPINION

Johanson, A.C.J. — Kim Hee Ju Booth appeals her convictions on two counts of attempted first degree murder, one count of first degree arson and one count of second degree arson. She argues that the convictions for both attempted first degree murder and first degree arson violate her right against double jeopardy, or in the alternative, should have merged. She also argues that the attempted first degree murder and first degree arson should have been treated as parts of the same criminal conduct at sentencing and that she received ineffective assistance of counsel at sentencing. Finding no error, we affirm.[1]

[1] A commissioner of this court initially considered Booth's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

On July 1, 2010, Jennifer Rubiano and her two children moved into the house of Booth's estranged husband, David.[2] Soon thereafter, their daughter was born. Though estranged, Booth and David were not yet divorced and still owned the house in which he was living with Rubiano. Booth began calling the house frequently, sometimes referring to David as a "bastard" and to Rubiano as a "bitch." 1 Report of Proceedings (RP) at 34. In the early hours of July 26, 2010, Rubiano's daughter noticed that the house was on fire and awoke the family. Rubiano looked out a window and saw Booth pouring gasoline from a five-gallon can onto the fire on the front porch. She saw that the back porch and lawn were also on fire. She later saw Booth sitting in her car next to David's truck, which Booth had set on fire.

Deputy Kevin Slease was dispatched to the house but before arriving there, contacted Booth's car. He pulled Booth out of the car and noticed that she reeked of gasoline. He also noticed that she appeared to have burn marks on her hands and feet. After being advised of her constitutional rights and waiving her right to remain silent, Booth said she was angry because her husband was not cooperating in selling the house and had moved Rubiano into the house. She said she decided to burn the house down, so she bought gas cans and gasoline and set fire to the house. She said she assumed her husband and Rubiano were in the house because their cars were there. She said her intent was to kill them and then kill herself. During a later taped statement, however, she said her intent was only to burn down the house, not to kill its occupants. Deputy Slease found gas cans, caps and a filler tube in Booth's car.

Deputy David Claridge responded to the scene of the fire. He saw a fire on the front

[2] We refer to David Booth by his first name to avoid confusion.

porch, smoke pouring from a truck in the driveway and fires in the backyard. He saw a gas can on fire on the front porch.

The State charged Booth with five counts of attempted first degree murder, one for each of the people in the house (counts I-V), one count of first degree arson for the house (count VI) and one count of second degree arson for the truck (count VII). Deputies Slease and Claridge testified as described above. An expert for Booth opined that she had post-traumatic stress disorder (PTSD) that made her incapable of forming the intent to kill. The jury convicted Booth on counts I and II, acquitted her on counts III, IV and V, and convicted her on counts VI and VII. The trial court included counts VI and VII in the offender scores for counts I and II, resulting in a standard sentence range of 390.75 to 520.5 months. It included counts I, II and VII in the offender score for count VI, resulting in a standard sentence range of 67 to 89 months. However, finding that Booth's PTSD impaired her understanding of the wrongfulness of her acts, the court imposed an exceptional sentence below the range for counts I and II of two consecutive 72-month sentences. It imposed a concurrent 89-month sentence on count VI.

First, Booth argues that her convictions for attempted first degree murder and for first degree arson violate her right against double jeopardy. She contends that because setting the fire to the house was both the act of arson and the substantial step toward murder, the convictions were the same in law and fact such that they violate double jeopardy. *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). While the crimes involved the same act, they are not constitutionally the same if "each [crime] requires proof of a fact which the other does not." *State v. Calle*, 125 Wn.2d 769, 778, 888 P.2d 155 (1995) (quoting *Blockburger*, 284 U.S. at 304). For

the jury to find Booth guilty of attempted first degree murder, the State had to prove that she, with a premeditated intent, did an act that was a substantial step toward causing the death of another person. RCW 9A.32.030(1)(a); RCW 9A.28.020(1) and (3)(a). For the jury to find Booth guilty of first degree arson, the State had to prove that she, knowingly and maliciously, caused a fire that (a) was manifestly dangerous to human life, (b) damaged a dwelling, or (c) was in a building in which there was a non-participating human being. RCW 9A.48.020(1). Because an attempt to commit premeditated first degree murder requires the specific intent to premeditate the death of another, while first degree arson does not require specific intent, attempted first degree murder requires proof of a fact that first degree arson does not. *Compare State v. Dunbar*, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991) (specific intent required for attempted first degree murder) *with State v. Nelson*, 17 Wn. App. 66, 71, 561 P.2d 1093 (specific intent not required for first degree arson), *review denied*, 89 Wn.2d 1001 (1997). Thus, the crimes are not the same in fact and law and so convictions for both do not violate double jeopardy.

Second, Booth argues that the first degree arson should merge into the attempted first degree murder convictions. *Freeman*, 153 Wn.2d at 777-78. But the merger doctrine applies only

> where the Legislature has clearly indicated that in order to prove a particular degree of crime (*e.g.* first degree rape) the State must prove not only that a defendant committed that crime (*e.g.* rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (*e.g.* assault or kidnapping).

Freeman, 153 Wn.2d at 777-78 (quoting *State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983)).

Had the State charged Booth with attempted first degree felony murder under RCW 9A.32.030(1)(c)(4), with first degree arson as the predicate felony, her argument might have merit. But the State did not. It charged her with attempted first degree premeditated murder under RCW 9A.32.030(1)(a). Thus, the first degree arson was not used to elevate the attempted murder to attempted first degree murder and so does not merge into the attempted first degree murder.

Finally, Booth argues that in calculating her offender score, her first degree arson conviction should have been treated as part of the "same criminal conduct" as the attempted first degree murder convictions, because they occurred at the same time, the same place and were committed for the same purpose.[3] But under RCW 9.94A.589(1)(a), for crimes to be part of the "same criminal conduct" for sentencing purposes, they require "the same criminal intent, are committed at the same time and place, and involve the same victim." As discussed above, attempted first degree premeditated murder and first degree arson require different criminal intents and so are not parts of the "same criminal conduct."[4]

We find no error in convicting Booth of both attempted first degree premeditated murder and first degree arson. Nor do we find error in treating those convictions separately for purposes of calculating her offender score.

[3] Booth raises this issue for the first time on appeal, as permitted by *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

[4] Booth alternatively argues that her trial counsel provided ineffective assistance by not raising the same criminal conduct issue. But because she cannot show that the result probably would have been different had her trial counsel raised the issue, she cannot show ineffective assistance of counsel. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, A.C.J.

We concur:

Van Deren, J.

Penoyar, J.